84-1749

Case No.

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1984

In re:

Victor L. Gelking,

Debtor

Phillip D. Armstrong, Trustee of the Estate of Victor Gelking,

Petitioner

vs.

State Bank of Towner,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the circuit court panel impermissibly apply state law to determine whether there had been a transfer of rights in an aircraft?

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OFFICIAL REPORTS

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 754 F.2d 778.

The opinion of the United States District Court, District of North Dakota is not reported. It is Civil No. A4-84-69.

The opinion of the United States Bankruptcy Court is not reported. It is Bankruptcy Case No. 81-05384.

JURISDICTIONAL STATEMENT

On February 12, 1985, the United States Court of Appeals for the Eighth Circuit filed its opinion affirming the judgment of the United States District Court for the District of North Dakota.

The United States Supreme Court's jurisdiction is invoked under 28 U.S.C.A. Section 1254(1).

CODE PROVISIONS & STATUTES INVOLVED

11 U.S.C.A. Section 544(a).

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C.A. Section 101(48).

"transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

AC Form 8050-94 (9-75).

Department of Transportation
Federal Aviation Administration
FAA Aircraft Registry AAC-250
P.O. Box 25504
Oklahoma City, Oklahoma 73125

INFORMATION TO AID IN THE REGISTRATION OF U.S. CIVIL AIRCRAFT

* * *

12. JUDICIAL SALE. The buyer of an aircraft at a judicial sale, or at a sale to satisfy a lien or charge, must submit a bill of sale signed by the sheriff, auctioneer, or other authorized person who conducted the sale and must include a statement that the sale was made under applicable local law.

49 U.S.C.A. Section 1403(c).

Validity of conveyances or other instruments; filing

(c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation: Provided, That previous recording of any conveyance or instrument with the Administrator of the Civil Aeronautics Administration under the provisions of the Civil Aeronautics Act of 1938 shall have the same force and effect as though recorded as provided herein; and conveyances, the recording of which is provided for by subsection (a)(1) of this section made on or before August 21, 1938, and instruments, the recording of which is provided for by subsections (a)(2) and (a)(3) of this section made on or before June 19, 1948, shall not be subject to the provisions of this subsection.

North Dakota Century Code 41-09-16(1)
(Uniform Commercial Code 9-203(1))

Enforceability of security interest - Proceeds, formal requisites.

1. Subject to the provisions of section 41-04-18 on the security interest of the collecting bank and section 41-09-13 on a security interest arising under the chapter on Sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless all of the following take place:

a. The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and, in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned.

b. Value has been given.

c. The debtor has rights in the collateral.

North Dakota Century Code 41-09-22(1)(b) and (3).

(Uniform Commercial Code 9-301(1)(b),(3)).

Persons who take priority over unperfected security interests - Right of "lien creditor".

1. Except as otherwise provided

in subsection 2, an unperfected security interest is subordinate to the rights of:

a. Persons entitled to priority under section 41-09-33.

b. A person who becomes a lien creditor before the security interest is perfected.

* * *

3. A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy, or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

North Dakota Century Code 41-09-24(1)
(Uniform Commercial Code 9-303(1))

When security interest is perfected; Continuity of perfection.

(1) A security interest is perfected when it has attached and when all of the applicable steps required for perfection have been taken. Such steps are specified in Sections 41-09-23, 41-09-25, 41-09-26, and 41-09-27. If such steps are taken before the security interest attaches, it is perfected at the time when it attaches.

North Dakota Century Code 41-09-23(4) (Uniform Commercial Code 9-302(4)).

When filing is required to perfect security interest -- Security interest to which filing provisions of this chapter do not apply.

* * *

4. Compliance with a statute or treaty described in subsection 3 is equivalent to the filing of a financing statement under this chapter, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in section 41-09-03 on multiple state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the statute or treaty; in other respects, the security interest is subject to this chapter.

STATEMENT OF THE CASE

The debtor filed his bankruptcy petition on August 21, 1981. In the debtor's possession at that time was a 1978 Piper Lance aircraft. The record owner of the aircraft at that time was not the debtor. Three individual co-owners were the owners of record with the FAA on August 21, 1981.

The State Bank of Towner claimed a security interest in the aircraft.

The corporation of the co-owners, D.D.C., Inc., but not the co-owners themselves, had given a bill of sale for the aircraft to the debtor. The bank filed for recordation the bill of sale along with its security agreement with the debtor. The FAA refused to record the bank's security agreement

because of the lack of documentation of the debtor's chain of ownership.

The missing link in the debtor's chain of ownership, the necessary bill of sale from the co-owners to D.D.C., Inc., was not made and filed for record-ation until after the debtor had filed his petition. The bank's security agree-ment was recorded on November 17, 1981.

On March 4, 1983, the trustee filed an adversary proceeding seeking an order declaring the lien of the trustee to be superior to the unperfected security interest of the bank.

The bankruptcy court held that the bank had a perfected security interest. The district court and circuit court affirmed.

ARGUMENT

The question presented is important to federal - state relations under the Federal Aviation Act, 49 U.S.C.A. Section 1403 et seq.

The Eighth Circuit Court of Appeals held that state law is applicable in determining when a transfer occurs of a perfected security interest in an aircraft subject to the Federal Aviation Act recording requirements. The decision of the circuit court is in conflict with a decision of this Court.

In Philko Aviation, Inc. v. Shacket, 103 S. Ct. 2476 (1983), this Court held that state laws regarding title transfers in aircraft are preempted by the Federal Aviation Act. Ibid at 681-82. This decision was followed by South Shore Bank v. Tony Mat,

Inc., 712 F.2d 896 (3rd Cir. 1983). These decisions interpreted Section 503(c) of the Federal Aviation Act, 49 U.S.C.A. Section 1403(c), to mean that every transfer of an interest in aircraft must be evidenced by an instrument and that every such instrument must be recorded before the rights of innocent third parties can be affected. Philko Aviation Inc. v. Shacket, supra at 2478.

On the other hand the Eighth Circuit Court of Appeals impermissibly applied a state law test to determine when a transfer occurred of a perfected security interest in an aircraft. The court held that less than full legal title was sufficient to perfect the bank's security interest over the lien of the trustee. Opinion at 781.

This is Professor Gilmore's statement regarding the fulfillment of the UCC requirement that the debtor have rights in collateral before a security interest can attach and become perfected. UCC Sections 9-203, 9-303.

Under the holdings of this Court and the Third Circuit Court of Appeals a party claiming an interest in aircraft either has full legal title or no title. Written instruments evidencing each transfer of an interest must be federally recorded. Unfortunately for the bank a transfer crucial to its security interest was not in existence and recorded until after bankruptcy intervened.

Transfer is broadly defined. 11 U.S.C.A. Section 101(48).

The filing of the bankruptcy petition gave rise to the trustee's strong

arm powers. The trustee's lien is superior to unperfected security interests. See generally In re Quality Holstein Leasing, 752 F.2d 1009, 1012-1015 (5th Cir. 1985).

It is obvious that the bank's security interest was not perfect against the world at the time the petition was filed. The record owner, the three individual co-owners, could have conveyed good title to an innocent third party, even in fraud of the debtor.

The fact that the record owner did not convey title to another is not material to the issue before the lower courts, that is, whether the bank's security interest was perfected at the time the petition was filed.

Under the UCC the preemption by a federal recording statute changes only

the method of filing the appropriate notice that a security interest is claimed in collateral. UCC Section 9-302(4). The debtor must still acquire rights in the collateral before a security interest can attach and be perfected. Under the Federal Aviation Act the debtor can acquire rights in the collateral only if there are written instruments of record which evidence his ownership of aircraft.

Where federal preemption occurs, the UCC requires compliance with the federal statute. UCC Section 9-302(4). The bank did not comply. It did not timely file for recordation all the necessary instruments of transfer.

The burden to properly record is on the secured party. In re Air Vermont, Inc., 41 B.R. 486, 492

(Bkrtcy. VT 1984); Cummins v. Sky Cruisers, Inc., 130 Cal. Rptr. 897, 900 (Ct. of Appeals 1976); Marsden v. Southern Flight Service, Inc., 227 F. Supp. 411, 419 (D.C. NC 1961).

After the debtor had filed his petition the further acts of the bank to obtain and record the final instrument of transfer were of no effect. In re Quality Holstein Leasing, supra at 1011.

The lack of the debtor's record ownership at the time of bankruptcy does not have the same fatal effect on the trustee as it has on the bank. The trustee, as successor to the rights of the debtor, could seek the assistance of a court of equity to compel a bill of sale from the co-owners to D.D.C., Inc. Pepper v. Litton,

308 U.S. 295, 304-305, note 11 (1939).

The trustee is an innocent third party with the status of a judicial lien creditor. 11 U.S.C.A. Section 544(a). The trustee's lien attached at the time of the filing of the petition. UCC Section 9-301(3). The FAA has provisions under the regulations by which judicial liens will lead to federal record rights. AC Form 8050-94(9-75), Paragraph 12; 14 CFR Part 49.

The bank, "like the Shackets failed to take appropriate prophylactic measures to ensure that the other party to the transaction performed the acts necessary for the appropriate recordation of the transfer. As a result, the transfer was ineffective. . .

"Although this is a harsh result, to hold otherwise would permit parties

to aircraft transfers to avoid the reach of 49 U.S.C. Section 1403(c) merely by failing, intentionally or not to record certain documents." In re Air Vermont, Inc., 45 B.R. 820, 823 (D.C. VT 1984).

The circuit court panel erred in failing to apply federal law to test the "rights in the collateral" requirement. The trustee respectfully requests the Court to review the decision.

APPENDIX

The following is the decision of the United States Court of Appeals of the Eighth Circuit, which was filed on February 12, 1985 and reported at 754 F.2d 778.

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Victor L. Gelking (debtor) filed a Chapter 7 bankruptcy petition on August 21, 1981. The trustee of his estate, Phillip D. Armstrong, sought to avoid the State Bank of Towner's (bank's) security interest in the debtor's airplane, pursuant to his status as an unsatisfied judicial lien creditor under 11 U.S.C. § 544(a) (1982), on the ground that the bank's security interest was not perfected prior to the date the debtor filed for bankruptcy. The bankruptcy court found that

the bank's security interest had been perfected prior to August 21, 1981. This determination was affirmed by the district court. The trustee appeals to this court. We affirm.

FACTS

From 1969 to January of 1981, the debtor operated a business in Minot, North Dakota, known as Minot Aircraft Sales. On September 27, 1979, the debtor obtained a loan from the bank for the purchase of two airplanes. Subsequently, the debtor exchanged the two airplanes for a 1978 Piper Lance airplane owned by D.D.C., Inc. The bank released its liens on the two exchanged airplanes upon the debtor's execution of a new security agreement granting the bank a security interest in the 1978 Piper. /780

This security agreement was then mailed, along with the debtor's bill of sale from D.D.C., Inc. and an application for registration, to the Federal Aviation Administration (FAA). These documents were filed for recordation with the FAA on May 12, 1981. The security agreement was filed a second time on July 20, 1981. Actual recordation of the security agreement, however, did not occur until November 17, 1981. This delay in recordation was partially caused by the bank's failure to supply evidence of the debtor's complete chain of ownership (i.e., bill of sale from initial owners to D.D.C., Inc. and the original bill of sale to the initial owners).

DISCUSSION

The relevant North Dakota statutory provisions read as follows:

3. The filing of a financing statement otherwise required by this chapter is not necessary or effective to perfect a security interest in property subject to:

a. A statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this chapter for filing of the security interest.

* * * *

4. Compliance with a statute or treaty described in subsection 3 is equivalent to the filing of a financing statement under this chapter, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith except as provided in section 41-09-03 on multiple state transactions. Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty are governed by the provisions of the statute or treaty; in other respects, the security interest is subject to this chapter.

N.D.C.C. § 41-09-23(3)(a), (4) (Uniform Commercial Code § 9-302(3)(a), (4)). The Federal Aviation Act pro-

vides a central clearing house for the recordation of interests in aircraft and, as such, is a type of statute referred to in subsection (3)(a) of N.D. C.C. § 41-09-23. 49 U.S.C. § 1403 (1982). See Philko Aviation, Inc. v. Shacket, 103 S. Ct. 2476, 2479 (1983); U.C.C. § 9-302 comment 8. Accordingly, under North Dakota law, security interests in aircraft can be perfected "only by compliance" with the Federal Aviation Act.

The pertinent portions of the Federal Aviation Act provide as follows:

> Validity of conveyances or other instruments; filing
>
> (c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft * * * against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed

for recordation in the office of the Secretary of Transportation * * *.

Effect of recording

(d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation * * *.

49 U.S.C. § 1403(c), (d) (1982) (emphasis added). These sections establish that perfection of a security interest occurs on the date the security agreement is "filed for recordation." See In re Farina, 25 Bankr. 411, 413 (Bankr. D. Me. 1982) (perfection of security interest in airplane occurs on date security agreement filed for recordation); In re Disney, 24 Bankr. 155, 157-58 (Bankr. D. Id. 1982) (same).

Under the Act, actual recordation is not necessary for perfection. Actual recordation is necessary, however, in order for the creditor to reap

the benefits of any priority his filing for recordation may have established. See Philko Aviation, Inc. v. Shacket, supra, at 2480. ("Although state law determines priorities, all 781 interests must be federally recorded before they can obtain whatever priority to which they are entitled under state law").

In this case, actual recordation of the bank's security agreement occurred. Since the bank's security interest was perfected as of the date it was filed for recordation (May 12, 1981), it was perfected prior to the date the debtor filed his bankruptcy petition (August 21, 1981). Accordingly, the bank's security agreement was not avoidable by the trustee.

The trustee seeks to avoid this result by arguing that attachment of

the bank's security agreement did not occur until the debtor acquired record ownership in the airplane. Attachment, of course, is a necessary step in the perfection of a security interest. N.D.C.C. §§ 41-09-16(1),-24(1) (U.C.C. §§ 9-203(1), 303(1)). Further, in order for a security interest to attach, the debtor must have "rights in the collateral." N.D.C.C. § 41-09-16(1)(c) (U.C.C. § 9-203(1)(c)).

The trustee admits that the debtor had an equitable interest in the airplane prior to filing for bankruptcy. The trustee argues, however, that the debtor's rights in the airplane were not sufficient to satisfy the "rights in the collateral" requirement. He bases this argument on the contention that, prior to the recordation of

his (sic) and D.D.C., Inc.'s interest in the airplane, he (sic) could not convey an interest which would be indefeasible and valid against third parties. We find no language in the North Dakota statutes or caselaw, however, which would support a conclusion that a debtor must possess such rights in order to have "rights in the collateral". Instead, we conclude that the rights that the debtor possessed in the airplane prior to filing were sufficient to meet the "rights in the collateral" requirement. See 1 G.Gilmore, Security Interests in Personal Property § 11.5 at 353 (1965) ("less than full 'legal title'" will satisfy the "rights in the collateral" requirement).

In conclusion we find that the bank's security interest in the debt-

or's airplane was perfected prior to the date the debtor filed for bankruptcy. Accordingly, the judgment of the district court is affirmed.

Following is the decision of the United States District Court, District of North Dakota, which was filed on June 15, 1984.

This is an appeal from an order dismissing the Trustee's complaint.

The bankrupt estate included a property interest in a Piper airplane in which the State Bank of Towner held a security interest. The State Bank of Towner had not, at the time bankruptcy was declared, completed registering its claim with FAA. The Trustee seeks

to set aside the security interest and recover the value of the airplane for the general creditors.

The evidence established these facts: The State Bank of Towner first held a security lien on two airplanes as of September 27, 1979. The debtor traded the old airplanes for a new one, without the advancement of further moneys by the bank. The bank released its liens on the old airplanes in exchange for a lien on the new one.[1] The debtor filed as a bankrupt under Chapter 7, August 12, 1981.

The loan by the bankrupt on April

1. The security agreement was stamped as a conveyance filed with the FAA aircraft registry on two dates: May 12, 1981, and, after correction of the record, again July 20, 1981.

30, 1981 was $60,380.23. The State Bank of Towner sold the aircraft for $31,000.00 on October 13, 1982.

The Bankruptcy Judge found the security claim was not upset by the bankruptcy filing and dismissed the Trustee's complaint.

In resolving this appeal, I apply the "clearly erroneous standard" as to the findings of fact, Clay v. Traders Bank of Kansas City, 708 F.2d 1347, 1350-51 (8th Cir. 1983).

Under Title 11 U.S.C. § 541, filing for relief in bankruptcy creates an estate made up of all legal or equitable interests of the debtor in property as of the commencement of the case. Transfers which perfect interests in estate properties after the commencement of the bankruptcy pro-

ceedings may be set aside by the Trustee of the estate, Title 11 U.S.C. § 549. Persons who have unsecured interests in estate property at the time the bankruptcy proceeding is commenced may, in certain circumstances have their interests avoided by the Trustee, Title 11 U.S.C. § 544.

The issue here is whether the bank's perfection of the security interest, which was completed within the time for avoiding transfers, is an avoidable interest. Title 49 U.S.C. 1403(a)(1) requires the Secretary of Transportation to maintain a recording system covering any conveyance which affects title to or interest in any civil aircraft of the United States. Title 49 U.S.C. § 1403(c) states: No conveyance or instrument the recording of which is provided for by subsection

(a) of this section shall be valid . . . against any person other than the person who gave it, his successors, or persons who have actual notice thereof, until it is filed.

This statute has been interpreted to mean that the instrument of conveyance must be recorded before the rights of innocent third parties can be affected.

See Philko Aviation, Inc. v. Schacket, 103 S.Ct. 2476, 2478 (1983). In that case the first purchaser left it to the seller to perfect the transfer. The seller did not do so but used the original record to sell the airplane a second time to an innocent buyer who investigated and relied on the FAA record. (Absence of the aircraft was explained to the new buyer by the seller's claim it had been

flown to a shop for maintenance.)

14 CFR 49.19 (1983) explains the statutory phrase "filed for recordation" (49 U.S.C. § 1403(c) as follows:

> A conveyance is filed for recordation upon the date and at the time it is received by the FAA Aircraft Registry.

In re Farina, 25 B.R. 411 (Bankr. D. Me. 1982), the security agreement registration and bill of sale of the airplane were received by the FAA for registration, but were not filed for nearly one year, until missing documents and signatures were received; and the security interest was held perfected at the time of the original receipt. So here, where the bank had undertaken to perfect its claim and the delay was due largely to the administrative problems of the FAA, the logic of Farina, supra, must govern.

IT IS ORDERED that the decision of the Bankruptcy Judge dismissing Plaintiff's complaint is confirmed.

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